

IN THE SUPREME COURT OF FIJI
AT SUVA
CIVIL APPELLATE JURISDICTION

CIVIL PETITION NO. CBV0006 of 2009

[On Appeal from the Court of Appeal No:
ABU0018 of 2008]

BETWEEN: **ARUN CHAND and AMI CHAND**
Petitioners

AND: **JAI CHAND PRASAD**
1st Respondent

AND: **REGISTRAR OF TITLES OFFICE**
2nd Respondent

Coram: **The Hon. Chief Justice Anthony Gates**
President of the Supreme Court

Counsel: **Mr. R. Singh for Petitioners**
Mr. V. Maharaj for 1st Respondent
No appearance for 2nd Respondent

Date of Hearing: **20th January 2011**

Date of Judgment: **21st October 2016**

JUDGMENT

Gates P

[1] The petitioners as Executors of their father's estate [Latchmi Dutt] were sued by their brother Jai Chand Prasad acting as executor for their mother's estate [Ramrajee]. The petitioners won their case in the High Court where no fraud was found, but lost in the Court of Appeal.

[2] In the Supreme Court the petitioners filed their petition almost 4 months out of time. In civil claims this has generally been considered a fairly lengthy delay.

- [3] The petition was filed as both a petition for special leave as well as an application for extension of time within which to bring the appeal. The petition was accompanied by an affidavit, that of Premila Wati filed on 9th April 2009. Within the affidavit was exhibited a further affidavit of Premila Wati explaining why the petition was lodged late.

Principles to be applied

- [4] Invariably, although not rigidly, enlargement of time applications are examined by appellate courts by considering five factors. This ensures a principled approach to the exercise of a judicial discretion in these matters. These factors are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate court's consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?

Reason for the failure

- [5] Mrs. Wati said she was the wife of the 2nd Petitioner Ami Chand. Mr. Chand had died on 26th March 2008. At first she said she was the sole surviving administratrix of his estate. In early December 2008 she had given instructions to her solicitors to take out letters of administration of her late husband's estate. On 8th January 2009 the estate was advertised in the Fiji Times she said, and that her solicitors were preparing an application for letters of administration.
- [6] She said she "could not file appeal within the required time frame because the letters of administration was pending."
- [7] She deposed to another affidavit this time sworn on 3rd September 2010. In this she said, not letters of administration but a probate, was taken out in which Avinesh

Prakash was referred to as the sole executor and trustee of Ami Chand's estate. But no application was ever made to change the name of the executors of the estate of Latchmi Dutt in these proceedings.

- [8] Her solicitors should have moved to replace her husband as named sole executor following his death, pending the hearing in the Court of Appeal. Proceedings had not been impeded in the Court of Appeal without that formal change of party however, and need not have obstructed the filing of the petition. When the papers were collected and ready, application could have been made to substitute the name of Mr. Chand's executor Mr. Avinesh Prakash. After all Mr. Arun Chand, the first named petitioner had not been replaced all along, he having died as long ago as 1st January 2006. The entity before the court as litigant was the estate, not the persons who acted as executors or trustees.
- [9] I conclude therefore that the excuse offered for the delay in lodging the petition was inadequate. No change was ever made by naming the executor and trustee for Mr. Ami Chand and nor was any change ever made for Mr. Arun Chand, also deceased.

The Length of the Delay

- [10] In dealing with this aspect of the inquiry in **NLTB v Ahmed Khan and Anor** Civil App. CBV0002.2013 15th March 2013 I had said:

“[27] The delay here is over 3 months. In *Ahilya Sharma & Anor. v Mahendra Pratap Singh* (unreported) Civil Appeal ABU0027.03S, 11th November 2004 the Court of Appeal when considering an application for enlargement of time within which to file an application for leave to appeal to the Supreme Court said (pp7-8):

“An intending appellant to the Supreme Court who is faced with an adverse judgment of this court must act with promptitude.”

- [28] In *Ahilya Sharma*, the court considered 40 days “a significant period of delay”, and refused to extend time. The lateness was only 11 days in *Avery v No. 2 Public Service Appeal Board and Others* [1975] 2 NZLR 86, yet when considering the whole history of the matter, leave was refused. The appeal was 47 days late in *Latchmi v Moti* [1964] 10 Fiji LR 138 at p.147B, and leave was rejected.

- [29] But then in *Norwich and Peterborough Building Society v Steed* [1991] 1 WLR 449 the delay was 6½ months. Though it was felt prejudice would occur to the Respondent, leave was granted. There had been considerable difficulty and delay in obtaining legal aid assistance for the appeal. In *Gatt's* case leave was given since there had been a very short delay, a few days only, and notice had already been given to the Respondents' solicitors.
- [30] Every case turns on its own special facts, though the principles for approaching such applications remain the same and all must be weighed."
- [11] In the instant case the delay is 4 months. In **Eddie McCaig v. Abhi Manu** CBV0002.12 27th August 2012 I had expressed the different approach to enlargement applications, civil as against criminal, in this way:

“[9] But it must be remembered that whilst in a compelling case, the court may more easily be convinced of a need for intervention in a criminal case with less regard for the prejudice caused to the State as Respondent, the position is different in a civil case. In such cases when exercising civil jurisdiction, the appellate courts have tended to be less lenient, than when considering the position of an Accused person who lodges a late appeal. In civil appeals the court has to be more evenhanded and consider equally the rights and interests of the Respondent with those of the applicant: *Latchmi & Anor. V Moti and Others* [1964] 10 Fiji LR 138 at 145G per Marsack JA.”

Whether a ground of merit

- [12] The first 2 grounds of appeal in the petition state that the Court of Appeal incorrectly applied the principles of fraud in property law, and on the facts by holding that there was proof of fraud.
- [13] This principle of law is long established. There was no misapplication of that settled law, and the factual reversal of the trial judge was open to the court.
- [14] Ground 3 deals with the intent of the petitioners in arranging the transfer swiftly. The petitioners explain it was because of the transferor's old age and done without fraudulent intent. This ground is essentially a question of fact also. It must be remembered also that because of the caveat on the titles the transfers could not be

registered and therefore their purported titles did not have the protection of indefeasibility as noted by the Court of Appeal.

[15] Grounds 4, 5 and 6 all deal with what are said to be significant facts pointing to a different conclusion on the issue of fraud.

[16] None of these grounds can be said to be grounds of merit justifying consideration. Nor are they likely to meet the threshold criteria for the grant of leave [section 7(3) Supreme Court Act].

Is there a ground which is likely to succeed?

[17] For the reasons given in para 16 none of these grounds can be said to be likely to succeed.

If time enlarged, will the Respondents be prejudiced?

[18] If the matter is allowed to proceed there will be further delay in the 1st Respondent's enforcement of action for his mother's estate against the father's estate. The family bitterness was alive in 1962 at the first maintenance action order at Nausori Magistrate's Court. That arose after Terms of Settlement, albeit imperfectly worded, had been signed up. The children of those parents are now themselves either elderly or deceased. Some finality in their affairs is urgent. The 1st Respondent will certainly be prejudiced by a grant of enlargement if allowed.

[19] The application for enlargement must be declined.

[20] Subsequent to the lodging of the petition, a notice of motion was filed by the petitioners with affidavit seeking a stay of the orders of the Court of Appeal. This was to apply to execution of the judgment, and to any attempt by the 1st Respondent to sell or dispose of the farm on freehold land represented by Certificates of Title CT 17772 and 17682. In view of the decision on the enlargement application there is no petition afoot enabling any grant of a stay to be ordered. The stay therefore is also declined.

Conclusion

[21] In the result the orders are:

1. The enlargement application is declined.
2. The stay is refused.
3. Costs are to be met by the Petitioners for the Estate in the sum of \$2,500.



A handwritten signature in blue ink, appearing to be "A. Gates", written over a dotted line.

Hon. Justice Anthony Gates
President of the Supreme Court

Solicitors:

Mr. R. Singh for the Petitioners
Mr. V. Maharaj for the 1st Respondent
No appearance for the 2nd Respondent

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